

Ethan Shaw and Clive D. Moon, on behalf	:	X
of themselves and all others similarly situated;	:	
Plaintiffs,	:	
	:	
VS.	:	
	:	
Toshiba America Information Systems, Inc. ;	:	
NEC Electronics, Inc.; Toshiba Corporation;	:	
Toshiba America, Inc.; Toshiba America Electronic	:	
Components, Inc.; and NEC Corporation,	:	
Defendants.	:	
	:	X

VS.	:	
	:	Class Action Complaint for Equitable
Toshiba America Information Systems, Inc. ;	:	Relief And Monetary Damages
NEC Electronics, Inc.; Toshiba Corporation;	:	
Toshiba America, Inc.; Toshiba America Electronic	:	
Components, Inc.; and NEC Corporation,	:	
Defendants.	:	
	X	

TO: ALL PERSONS<sup>1</sup> WHO ARE UNITED STATES CITIZENS OR RESIDENTS WHO OWN OR LEASE A TOSHIBA LAPTOP OR NOTEBOOK COMPUTER, OF ANY MODEL, MANUFACTURED ON OR AFTER JANUARY 1, 1985, THAT WAS DISTRIBUTED OR SOLD, DIRECTLY OR INDIRECTLY, BY TOSHIBA AMERICA INFORMATION SYSTEMS, INC. (OR ITS PREDECESSOR) AND WHICH HAS AN INTERNAL FLOPPY DISK DRIVE OR FLOPPY DISK CONTROLLER.

**Please read this entire notice carefully to understand your rights and options.**

**See the definition of "Settlement Class" and §§ 2.2 and 2.3 below for instructions on how to determine from the outside of the case of your Toshiba Laptop Computer whether you are within the Settlement Class.**

<sup>1</sup> The word “ Persons” means all natural persons, individuals, corporations, agencies, bodies, governments, associations, partnerships, trusts or any other person or type of legal entity that is a United States citizen or resident.

The right of a Person who leased a Toshiba Laptop Computer to be a Class Member will be determined by the lease agreement covering the Toshiba Laptop Computer as explained in the Settlement Agreement.

This notice ("Class Notice") is to advise you as a member of the Settlement Class ("Class Member" or "Settlement Class Member") of the filing and status of the Action and of your rights with respect to a proposed settlement of the Action (including certain rights that you can lose if you do not protect them). These rights include the right to be excluded from the settlement. If you are a Class Member and do not request exclusion from the settlement, you will be a Settlement Class Member if certification of the Settlement Class is finally approved. As a Settlement Class Member, you will have the right to attend the hearing that will be held by the United States District Court for the Eastern District of Texas (the "Court") on January 19, 2000, at 10:00 a.m., at which hearing the Court will consider the fairness, reasonableness, and adequacy of the proposed settlement as set forth in the October 28, 1999, Settlement Agreement and Release ("Settlement Agreement") on file with the Court. **As a Settlement Class Member, you also have the right to object by filing written objections with the Court by January 5, 2000, which meet the requirements set by the Court. For more details see §3.1.4 below.**

**You also have the right to opt out.**

- **The Court will exclude you from the Settlement Class if you mail a written request (Opt-Out Form) by January 5, 2000. For more details see §3.1.2 below.**
- **The Final Judgment will include you if you fail to make a request to opt out by January 5, 2000. For more details see §§ 2.6, 3.1.1 and 3.1.2 below.**
- **If you do not request exclusion you may, if you desire, enter an appearance through counsel. For more details see §3.1.3 below.**
- **If you do not request exclusion, your rights will be affected by the proceedings in this Action as you will be given certain rights in exchange for giving up all claims that were made or could have been made in the Action (except for your "Retained Rights" defined in §2.6 below), including the waiver of your right to a trial on such claims. For more details see §2.6 below.**

## **1. BACKGROUND OF THE ACTION**

1.1 The Action was filed by Class Representatives in the Court on March 5, 1999, against Toshiba America Information Systems, Inc. ("TAIS"), and NEC Electronics, Inc. ("NECEL"). The Class Representatives subsequently added Toshiba Corporation, Toshiba America, Inc., Toshiba America Electronic Components, Inc., and NEC Corporation as defendants. The Class Representatives pleaded causes of action on behalf of themselves and the Settlement Class for injunctive relief, violation of 18 U.S.C. § 1030, revocation under U.C.C. §2-608, breach of contract, breach of express warranties, breach of implied warranties, and declaratory relief.

1.2 The Settling Defendants denied any liability, and asserted affirmative defenses, including statute of limitations, estoppel, laches, waiver, lack of privity, ratification, and lack of standing. The Settling Defendants also sought declaratory relief that they were not liable to the Class Representatives or the Settlement Class, and counterclaimed for attorney fees.

1.3 The Class Representatives alleged that the microcode in the FDC – by not setting an overrun flag on the last byte of a sector when transferring data to or from a floppy disk – could result in undetected data loss or corruption. The plaintiffs alleged that NEC designed the FDC and licensed it to Toshiba, which incorporated it into its Toshiba Laptop Computers. NEC denied that it licensed the design to Toshiba. The Settling Defendants admitted that the Toshiba Laptop Computers contain such an FDC, but the Settling Defendants denied that any data loss or corruption was likely to occur in normal use of a Toshiba Laptop Computer.

1.4 Settlement Class Counsel investigated the facts underlying this Action for over a year and conducted extensive discovery in this Action. Prior to settling the Action, Settlement Class Counsel translated and analyzed Defendants' and NEC defendants' voluminous and technical documents, which were obtained over numerous objections; propounded interrogatories, requests for production, and requests for admission; and took lengthy key and critical depositions of party witnesses, executives, and officers. Settlement Class Counsel additionally prepared for and conducted a three-week mediation process involving the Class Representatives and persons from the United States and Japan.

1.5 A hearing on class certification and a preliminary injunction was set for November 29, 1999. The Court ordered the parties to mediate the case beginning September 24, 1999, with mediator retired Judge Thomas A. Thomas in Beaumont, Texas. Pursuant to that mediation order, the parties engaged in arms-length negotiations from September 24, 1999, to October 28, 1999. Those negotiations resulted in the October 28, 1999, Settlement Agreement.

1.6 In the Action, the Class Representatives were seeking actual damages to the Toshiba Laptop Computer and the physical floppy disks used with the Toshiba Laptop Computer. Consequential damage claims are not affected by the Settlement. The Class Representatives were seeking maximum actual damages in the amount of the purchase price of their Toshiba Laptop Computers. The Settling Defendants denied that the Class Representatives or the Class Members were entitled to receive their entire purchase price as a measure of maximum damages in the Action. The Class Representatives were not seeking any consequential damages in the Action.

1.7 Any Person who owns or leases a Toshiba Laptop Computer who brings a similar individual lawsuit against the Settling Defendants and prevails on the liability issues can expect to receive a range of recovery from \$0 to the purchase price of their Toshiba Laptop Computer. Settling Defendants contend that the reason that one possible recovery is zero dollars (\$0.00) is because the jury may conclude that no data loss actually resulted from the FDC microcode at issue and/or that the software patch developed by Settling Defendants "repairs" the FDC and complies with the Settling Defendants' obligations under the Toshiba warranty provisions. In order to prosecute such a suit on an individual basis, an individual claimant would need to hire an attorney on an hourly fee basis or a contingency fee basis. If the individual is not successful, the court may award attorneys' fees and expenses on the declaratory judgment claim against the claimant in the amount of fees and expenses incurred by the

defendant.

1.8 The parties to this Settlement Agreement (described in greater detail below) believe that the terms of the settlement in the Settlement Agreement are fair, just, reasonable, adequate, and in the best interests of the Settlement Class. The parties reached this conclusion after investigating and considering, among other things, the strengths and weaknesses of Class Members' claims against the defendants, the present financial condition of Settling Defendants, the assets of the Settling Defendants that are located in the United States, the uncertainties inherent in this complex litigation, and the substantial benefit provided by the Settlement Agreement to the Class Members. While denying any liability in this Action, and denying that any defect or problem exists in Toshiba Laptop Computers with respect to the FDC, the Settling Defendants consider it desirable and in their best interests that this Action be dismissed on the terms set forth in the Settlement Agreement and the proposed Final Judgment in order to avoid further expense, inconvenience, distraction, and to avoid protracted litigation. Settling Defendants also desire to ensure their customers and end-users that the Toshiba brand name merits their trust.

1.9 This Class Notice does not indicate any expression or opinion by the Court concerning the merits of the respective claims or defenses asserted in the Action. This Notice is sent merely to advise you of the proposed settlement and of your rights in connection therewith.

## **2. TERMS OF THE PROPOSED SETTLEMENT**

2.1 Subject to the Court's final approval, Class Representatives and Settling Defendants have signed the Settlement Agreement, which provides that Settling Defendants shall make available to Settlement Class Members the following settlement consideration ("Per Unit Settlement Packages"), depending upon when the Settlement Class Member purchased or leased their Toshiba Laptop Computer(s):

### **2.2 The Cash Remedy**

All Settlement Class Members who Own<sup>2</sup> a Toshiba Laptop Computer that was purchased new on or after March 5, 1998, shall be entitled to the "Cash Remedy," which is cash in an amount that is calculated with respect to each particular Toshiba Laptop Computer Unit as set forth on the table labeled as Exhibit A on page 8 of this Notice and incorporated herein by reference. The Cash Remedy recoveries will vary in a range up to \$443.21. You can determine the date that your Toshiba Laptop Computer was manufactured by looking at the serial number (located on the bottom of your Toshiba Laptop Computer). Toshiba Laptop Computers manufactured in 1998 and 1999 start with the identifier of the month (1, 2, 3, 4, 5, 6, 7, 8, 9, X, Y, Z) as the first digit, and then contain the last number of the year (8 for 1998, and 9 for 1999) as the second digit. You can establish that your Toshiba Laptop Computer was purchased on or after March 5, 1998, either by submitting proof of purchase that shows this, or if the first two digits in your serial number are: 28, 38, 48, 58, 68, 78, 88, 98, X8, Y8, Z8, 19, 29, 39, 49, 59, 69, 79, 89, 99, X9, Y9, or Z9. To claim this remedy you must submit a Claim Form, Product Identification Documentation, and Proof of Purchase. Product Identification Documentation is defined in §1 of the Settlement Agreement. Proof of Purchase is one or more of: registration on or appearance on TAIS' warranty database; a copy of a receipt; a negotiated check; a bank copy or bank-generated record of a negotiated check; a credit and bill or receipt evidencing the purchase of a Toshiba Laptop Computer; or a photograph or photocopy of the bottom of the Toshiba Laptop Computer clearly and legibly showing the model number and serial number of the Toshiba Laptop Computer. Proof of Purchase must be in a form satisfactory to the Claims Administrator. Settlement Class Members who qualify for the Cash Remedy also will qualify for and be entitled to the "Warranty Remedies" set forth below.

The total amount of cash to be paid by Settling Defendants with respect to the Cash Remedy shall be \$597,500,000.00 (\$597.5 million), which is guaranteed jointly and severally by the Settling Defendants, each as primary obligors, regardless of the amount of allowed claims entitled to the Cash Remedy (the "Guaranteed Fund"). On or before the Fairness Hearing Date, one or more of the Settling Defendants shall confirm a reserve on their books in the amount of the Guaranteed Fund, which will be established by an affidavit of an officer of Toshiba Corporation. On or before the Effective Date, one or more of the Settling Defendants will either [A] deposit the full amount of the Guaranteed Fund into an interest bearing account at a mutually acceptable bank or banks, subject to the jurisdiction of, and approved by, the Court; or [B] secure the obligation to create, maintain, distribute, and pay the Guaranteed Fund with a standby letter of credit in favor of the Court issued by a mutually agreeable U.S. bank (or banks), subject to the jurisdiction of, and approved by, the Court. No distributions of allowed claims to Settlement Class Members entitled to the Cash Remedy shall be made until at least ten (10) calendar days after the Final Claims Bar Date. The Final Claims Bar Date will be set by the Court, but is proposed to be June 3, 2000. Interest on the Guaranteed Fund (either earned or accrued at Toshiba's internal rate of interest, depending on the option selected by the Settling Defendants) shall be income, if to anyone, of the Settling Defendants earning or accruing same, but shall be used by the Settling Defendants to pay costs of Notice, costs of Claims Administration, hourly fees to Class Counsel for post-Notice assistance to Settlement Class Members, class litigation costs and expenses, court costs, and Settlement Class Counsel Claims Administration oversight fees. If the interest earned or accrued exceeds such costs, then the interest will revert to Settling Defendants. Said interest does not, however, limit any obligation of the Settling Defendants to pay amounts owed under this Settlement Agreement. In the event that taxes are owed with respect to interest earned or accrued on the Guaranteed Fund, then it shall be owed and paid by the Settling Defendants, jointly and severally. It is anticipated that the Guaranteed Fund will be consumed by allowed claims entitled to the Cash Remedy. However, in the event that the allowed claims entitled to the Cash Remedy do not equal or exceed the Guaranteed Fund, then the remaining (unclaimed) part of the Guaranteed Fund (excluding earned or accrued interest) shall be paid and distributed by the Closing Date to the following Charity:

An Internal Revenue Code Section 501(c)(3) entity to be formed by Settlement Class Counsel by no later than January 10, 2000, to be formed and operated for the purpose of purchasing Toshiba laptop and desktop computers and distributing them in the United States to schools, churches, non-profit organizations, libraries, hospitals, and the poor. The Charity shall ensure that the computers are distributed equitably across the United States consistent with the makeup of the nationwide Settlement Class. The Charity shall be prohibited from

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<sup>2</sup> "Own" means own or lease a Toshiba Laptop Computer. With regard to a leased Toshiba Laptop Computer, the Person entitled to the benefits and remedies afforded by the Settlement Agreement shall be determined by the lease agreement covering the Toshiba Laptop Computer at issue.

engaging in any activity that is contrary to the best interests of Settling Defendants. There shall be three (3) initial directors, two (2) of whom shall be selected by Settlement Class Counsel and one (1) of whom shall be selected by Settling Defendants. The number of directors will not be changed during the existence of the Charity except by a unanimous vote. The rights to appoint the directors will remain as herein specified during the existence of the Charity, and the three seats on the board are to be held permanently by representatives and their successors who are appointed in the manner herein stated. At Settling Defendants' option, the name of the Charity will include the name "Toshiba." Further, all computers distributed by the Charity shall be Toshiba brand computers purchased from TAIS or a distributor, reseller, or dealer designated by TAIS. The Charity shall ensure that all of the money in the Charity is expended and Toshiba brand computer products distributed over a five (5) year period after the date on which the Charity was first funded with funds from the Guaranteed Fund. All expenses for the administration of the Charity shall be paid from the funds contributed to the Charity. The Charity shall have no authority to solicit additional funds, nor shall the mission or purpose of the Charity be changed. It is understood and agreed that the Charity shall not be self-perpetuating and that it shall cease to exist when its funding has been exhausted or five (5) years from the date of its first funding from the Guaranteed Fund, whichever occurs first. If funds remain when the Charity ceases to exist, then the directors shall expend the remainder for the purposes of the Charity.

If the allowed claims entitled to the Cash Remedy exceed the Guaranteed Fund (excluding earned or accrued interest), then the Claims Administrator shall adjust the payments from the Guaranteed Fund after receiving Court approval to do so, and provided that the adjustment is consistent with the factors reflected in Exhibit A.

### **2.3 The Warranty Remedies**

All Settlement Class Members who Own a Toshiba Laptop Computer of any model that is or are covered by the standard or extended written express limited warranty of TAIS (or its predecessor) as of and from and after March 5, 1999 shall be entitled to the following remedies: [A] the Software Patch; and [B] if they are not satisfied with the Software Patch, a hardware replacement alternative as provided in §2.3.2 below; and [C] the Coupon provided for in §2.3.3 below (the "Warranty Remedies"). You do not have to be a registered owner in order to qualify for the warranty remedies. Coverage of a particular Settlement Class Member under the foregoing described warranties shall be determined by the model number and Serial Number Warranty Code on each Toshiba Laptop Computer as supplemented by the warranty records of TAIS to identify any Toshiba Laptop Computers under extended warranty, per the customary practices of TAIS. You can determine whether you qualify for this remedy by looking at the serial number (located on the bottom of your Toshiba Laptop Computer). There will be a "-1" to the right of the serial number if the Toshiba Laptop Computer had a standard one-year manufacturer's warranty, or a "-3" if it had a standard three-year manufacturer's warranty. See §2.2 to determine when your Toshiba Laptop Computer was manufactured if it was manufactured in 1998 or 1999. For Toshiba Laptop Computers manufactured prior to 1998, your Toshiba Laptop Computer will either have the same month and year indicators as explained in §2.2 (except 7 would represent 1997, 6 would represent 1996, etc.); or your Toshiba Laptop Computer may have the first two digits represent the month (01, 02, 03, 04, 05, 06, 07, 08, 09, 10, 11, and 12), and the third digit represents the year. To claim this remedy you must submit a Claim Form and Product Identification Documentation.

#### **2.3.1 The Software Patch**

The Software Patch is a device driver level or similar low level software patch that alerts the Windows® 3.x, Windows® 95, Windows® 98, Windows® NT 4.0, Windows® 2000, DOS 5.x, DOS 6.2, Free BSD 3.x, Linux 2.0, and Linux 2.2 operating systems if an overrun on the last byte of a sector caused data to be written incorrectly to a floppy disk. Before being made available to the public or owners of Toshiba Laptop Computers, the Software Patch shall be copyrighted in the United States. The Software Patch shall be distributed and downloaded via TAIS's Internet web page or, at the request of an Owner of a Toshiba Laptop Computer, mailed to the Owner (without cost to the Owner), but only to those Owners who identify themselves by verified model and serial number. Further, the Software Patch will be licensed to the Owner downloading or receiving same, with no right of duplication or further distribution, licensing, or sub-licensing.

The Software Patch available to those entitled to the Warranty Remedies will be provided free of charge (other than internet access charges for which the Class Member is responsible), but access to and use of the Software Patch shall be limited by a license agreement that does not permit duplication.

The same Software Patch will be made available to Settlement Class Members under the Warranty Remedies as the Equitable Remedies.

#### **2.3.2 The Hardware Replacement Alternative**

In order to qualify for the hardware replacement alternative provided for in §2.3[B] above, a Settlement Class Member who qualifies for said remedy must [A] submit a Claim Form on or before the Final Claims Bar Date and [B] give the Claims Administrator notice of such Settlement Class Member's dissatisfaction with the Software Patch in writing and under oath by no later than one hundred twenty (120) days following the Final Claims Bar Date. The required statement must be under oath, but need not be witnessed or notarized. To obtain the hardware replacement alternative, such Settlement Class Member also must return the \$225 Coupon he or she received as set forth in §2.3.3 below (but will be entitled to receive the \$200 Coupon as set forth in §2.3.3 below) or, if he or she no longer has the \$225 Coupon that he or she received, he or she must return a good check for \$25.00 made payable to TAIS and sent to the Claims Administrator to be forwarded to TAIS (and will not be entitled to the \$200 Coupon as set forth in §2.3.3 below). If a \$25 check is required to be tendered, then the Claims Administrator may delay providing the hardware replacement until the check is collected. The Claims Administrator has discretion to adjust the foregoing without altering the net effect or intention of the foregoing (for example, but without limitation, for a claimant who certifies his dissatisfaction with the Software Patch *before* receiving any Coupon).

As to each Toshiba Laptop Computer for which there is an allowed claim for a hardware replacement alternative under §2.3[B], subject to §2.3.2, Settling Defendants shall provide the hardware replacement alternative by providing the Owner of such Toshiba Laptop Computer with a Coupon for the purchase of the compatible Toshiba model external PCMCIA floppy disk drive (card, cable, and drive included), which does not operate through the Toshiba Laptop Computer's floppy disk controller. The Coupon provided for in this sub-section is not assignable and may be used only to purchase the compatible Toshiba model external PCMCIA floppy disk drive. All Coupons described in this section will be bearer certificates with a cash equivalent value, but may not be redeemed for cash. Coupons may be redeemed only at participating resellers or retailers. The Settlement Class Member who uses the Coupon shall be required to pay any sales tax (if any) due on account of the transaction in which the Coupon is used. The list of participating resellers or retailers will be presented to the Court and Settlement Class Counsel for approval at least ten

(10) days before the Fairness Hearing and must include at least one mail order option with the capacity to handle the expected volume. The approved list of participating resellers or retailers shall be mailed to allowed claimants along with their Coupons. Coupons shall expire one-hundred eighty (180) days after mailed to an allowed claimant and bear a corresponding expiration date.

At the option of a particular Settlement Class Member who: [A] is entitled to the hardware replacement alternative under §2.3.2; and [B] does not want the external PCMCIA floppy disk drive that is available as the hardware replacement under §2.3.2 (the external PCMCIA floppy disk drive), the Settling Defendants shall provide a "Hardware Fix" (*i.e.*, a redesigned Toshiba FDC that can set the overrun error flag on read and write operations to and from all sectors, including the last byte of a sector) as provided in this sub-section to be made by TAIS at its service depot in Irvine, California, or other location designated by TAIS in the 48 contiguous states of the United States. The Hardware Fix available in this sub-section is in lieu of the hardware replacement provided for under §2.3.2. Settlement Class Members who elect the Hardware Fix under this sub-section must comply with the following procedure:

- (i) all system software must be "backed-up" (TAIS depot will not reconfigure the computer);
- (ii) all non-standard external options (e.g. PCMCIA cards, external extra memory) must be removed;
- (iii) the affected Unit must be packed according to instructions in containers suitable for shipment (the Claims Administrator will provide such instructions);
- (iv) the Settling Defendants shall have no liability for loss or damage in shipment and the electing Settlement Class Member shall be advised that the Unit should be insured by the electing Settlement Class Member for incoming and outgoing shipment;
- (v) The electing Settlement Class Member must call the TAIS InTouch Center (phone number 1-800-999-4273) to obtain an assigned case number or Return Material Authorization number prior to shipment;
- (vi) The electing Settlement Class Member must allow forty-five (45) days for return of the affected Unit.

The deadline for electing the hardware replacement under § 2.3.2 shall be one-hundred twenty (120) days after the Final Claims Bar Date (which is expected to be June 3, 2000). However, any Settlement Class Member whose Unit remains covered by the TAIS standard or extended warranty beyond one-hundred twenty (120) days after the Final Claims Bar Date retains his or her right to seek an external floppy disk drive replacement for the floppy disk controller or the Hardware Fix for the remaining period of his or her warranty, but the qualification for such remedies (after one-hundred twenty (120) days after the Final Claims Bar Date) shall be governed by the warranty and not by this Settlement Agreement and said claim will be an individual matter between the applying Settlement Class Member and TAIS, and not subject to administration by the Claims Administrator.

### **2.3.3 Additional Coupons For Members of Warranty Class**

In addition, all Settlement Class Members entitled to the Warranty Remedies who do not elect to receive a hardware replacement alternative are entitled to a Coupon in the amount of \$225. Those Settlement Class Members entitled to the Warranty Remedies who do elect to receive a hardware alternative are entitled to a Coupon in the amount of \$200, subject to the conditions set forth in §2.3.2. The \$225 Coupon will be mailed to qualifying Settlement Class Members within five (5) business days after said Settlement Class Member's claim is allowed and shall be accompanied by conspicuous notice regarding the right to receive a hardware replacement and the procedure for obtaining said replacement. Both types of Coupons received by those entitled to the Warranty Remedies can be used toward the purchase of any Toshiba Computer Product. The Coupons provided for in this sub-section will be bearer certificates that are freely assignable and may be aggregated. However, they may not be redeemed for cash, nor for anything other than toward the purchase of any Toshiba Computer Products. "Toshiba Computer Products" are any computer related product sold under the Toshiba name and distributed in the United States by TAIS, including but not limited to laptop computers, notebook computers, desktop computers, monitors, docking stations, extra memory, batteries, cases, and other accessories. Coupons may be redeemed only at participating resellers or retailers. The Settlement Class Member (or assign) who uses the Coupon shall be required to pay any sales tax (if any) due on account of the transaction in which the Coupon is used. The list of participating resellers or retailers will be presented to the Court and Settlement Class Counsel for approval at least ten (10) days before the Fairness Hearing and must include at least one mail order option with the capacity to handle the expected volume. The approved list of participating resellers or retailers shall be mailed to allowed claimants along with their Coupons. Coupons shall be coded and there shall be only one Coupon redeemed per Toshiba Laptop Computer. Coupons shall expire one-hundred eighty (180) days after mailed to an allowed claimant and bear a corresponding expiration date. All Coupons described in this section have a cash equivalent value, but may not be redeemed for cash.

### **2.4 The Equitable Remedy**

All Settlement Class Members, regardless of when they purchased a Toshiba Laptop Computer and regardless of whether the Toshiba Laptop Computer is under warranty, who do not qualify for a Cash Remedy or Warranty Remedy, shall be entitled to the Software Patch free of charge (other than internet access charges for which the Class Member is responsible), plus a Coupon in the amount of \$100.00, which can be used toward the purchase of any Toshiba Computer Product. The Coupons provided for in this sub-section will be bearer certificates that are freely assignable and may be aggregated. However, they may not be redeemed for cash, nor for anything other than toward the purchase of any Toshiba Computer Products. Coupons may be redeemed only at participating resellers or retailers. The Settlement Class Member (or assign) who uses the Coupon shall be required to pay any sales tax (if any) due on account of the transaction in which the Coupon is used. The list of participating resellers or retailers will be presented to the Court and Settlement Class Counsel for approval at least ten (10) days before the Fairness Hearing and must include at least one mail order option with the capacity to handle the expected volume. The approved list of participating resellers or retailers shall be mailed to allowed claimants along with their Coupons. Coupons shall be coded and there shall be only one Coupon redeemed per Toshiba Laptop Computer. Should more than one Person submit a claim for the same Toshiba Laptop Computer, then the Claims Administrator shall have the duty to resolve competing claims. Coupons shall expire one-hundred eighty (180) days after mailed to an allowed claimant and bear a corresponding expiration date. All Coupons described in this Section have a cash equivalent value, but may not be redeemed for cash. The Settling Defendants agree to provide this remedy within five (5) business days after a particular claim entitled to the Equitable Remedy is allowed. The Software Patch will be provided free of charge (other than internet access charges for which the Class member is responsible), but access to and use of the Software Patch shall be limited as set forth in §2.3.1. To claim this remedy you must submit a Claim Form and Product Identification Documentation.

### **2.5 Attorney Fees, Class Representative Fees, And Litigation Costs And Expenses**

Additionally, Settling Defendants have agreed to pay a separate sum of \$147,500,000.00 in full payment of the fees of Settlement Class Counsel incurred prior to this Notice. This amount does not reduce the cash Guaranteed Fund available to those class members entitled to the Cash Remedy and is in addition to and separate from all other consideration and remedies paid to and available to the Settlement Class and Settlement Class Counsel. Based on those agreements, Settlement Class Counsel and Settling Defendants intend to seek approval from the Court of attorneys' fees in the amount of \$147,500,000.00 (\$147.5 million), and to seek fees to each of the two named Class Representatives of \$25,000.00 each. As part of this settlement, Settling Defendants jointly and severally agree to pay these fees and awards up to these amounts, in addition to the other consideration afforded the Settlement Class and to Settlement Class Counsel. Payment of these fees shall be in addition to and shall not decrease or increase the Per Unit Settlement Packages or Guaranteed Fund. The Settling Defendants and Settlement Class Counsel have agreed that upon final approval, attorneys fees shall be payable to Settlement Class Counsel in two annual installments: \$73,750,000.00, due and payable on the Effective Date, and \$73,750,000.00 due and payable on the first anniversary of the Effective Date. The Class Representatives' fees will be due and payable, in cash, on the Effective Date. Any disallowed fees shall be paid to the Charity described in §2.2 above.

In addition to the attorney fees described above, Settling Defendants shall pay Settlement Class Counsels' fees, expenses, and costs in responding, after the Notice Date, to questions from the Putative Class Members and Settlement Class Members, on an hourly basis based on conventional rates equivalent to Settling Defendants' Counsel's rates to Settling Defendants. Settling Defendants may use interest accrued or earned on the Guaranteed Fund to pay these fees. In addition to payment of attorney fees, Settling Defendants jointly and severally agree to pay an additional amount equal to Settlement Class Counsels' costs and expenses incurred in this Class Action. Settling Defendants will not object so long as the costs and expenses incurred by Settlement Class Counsel (which costs and expenses do not include the costs of notice; costs of claims administration; continuing fees, costs and expenses of class administration oversight; or the fees, costs and expenses associated with responding to questions from Class Members) do not exceed \$3,000,000.00. The amount of said costs and expenses shall be determined as of the Fairness Hearing Date based on supporting documents provided by Settlement Class Counsel, and, in the event of a disagreement between Settlement Class Counsel and Settling Defendants as to amount (if the amount exceeds \$3,000,000.00), then the amount shall be determined by the Court. In addition, the Settling Defendants shall pay the cost of Notice and of Claims Administration, including the fees and expenses of Settlement Class Counsel's oversight function. Payments of these costs and expenses shall be in addition to and shall not decrease or increase the attorney fees, Per Unit Settlement Packages or Guaranteed Fund. However, interest accrued or earned on the Guaranteed Fund may be used to pay such costs and expenses, but does not limit any obligation to pay such costs and expenses.

## **2.6 Release**

In addition to the effect of any Final Judgment entered in accordance with this Settlement Agreement, and except as expressly provided in §16 of the Settlement Agreement regarding Retained Rights, upon this Settlement Agreement becoming final on the Effective Date, the Settling Defendants and each of their present and former parents, wholly-owned subsidiaries, divisions, "Qualifying Affiliates," officers, directors, employees, and attorneys (and the predecessors, heirs, executors, administrators, successors and assigns of each of the foregoing) (all called the "Released Parties"), shall be released and forever discharged by the Class Representatives, Settlement Class Members, and their respective heirs, assigns, and successors, from those claims, demands, actions, suits, and causes of action that are or could have been pleaded in the Action regarding economic damage to Toshiba Laptop Computers and the physical floppy disks used therewith caused by the Toshiba floppy disk controller condition which is the subject matter of Plaintiffs' Fourth Amended Complaint ("Released Rights"), other than (and not being included in the Released Rights) the Retained Rights and the rights and claims created by this Settlement Agreement. The term "Qualifying Affiliates" means Toshiba Corporation's consolidated subsidiaries, insurers, licensees, authorized service providers, resellers, agents, retailers, vendors, suppliers, and customers who are found to have liability for the same economic damage to the same Toshiba Laptop Computers and floppy disks used therewith Owned by the Settlement Class Members caused by the Toshiba floppy disk controller condition that is the subject matter of Plaintiffs' Fourth Amended Complaint. By this Settlement Agreement, the members of the Settlement Class intend to settle with and release only the Released Parties as set forth herein and only to the extent that they have liability for the same economic damage to the same Toshiba Laptop Computers and floppy disks used therewith Owned by the Settlement Class Members caused by the Toshiba floppy disk controller condition that is the subject matter of Plaintiffs' Fourth Amended Complaint. This Release and the Final Judgment do not release any Released Party from any liability for any damaged computer, or damage caused by any chip, floppy disk controller, or other item not within the express scope of the foregoing. Further, this Release extends only to the damage caused to the Toshiba Laptop Computers and floppy disks used therewith Owned by the Settlement Class Members that is the same damage covered by Plaintiffs' Fourth Amended Complaint. Notwithstanding anything to the contrary, Settlement Class Representatives and Settlement Class Members and their survivors retain claims against the Settling Defendants for unrelated warranty claims and consequential damages to the extent set forth below regarding Retained Rights. Settling Defendants release Plaintiffs, Settlement Class Counsel, and all Settlement Class Members from the counterclaims pleaded by them in this Class Action. Notwithstanding the release of Released Rights or the entry of the Final Judgment, individual Settlement Class Members retain the right to bring individual claims for consequential damages against the Settling Defendants, including but not limited to, consequential damages arising out of the claims, demands, actions, suits, and causes of action pleaded in Plaintiffs' Fourth Amended Complaint (The "Retained Rights"). Further, this Settlement Agreement, the release, and the Final Judgment do not affect any Settlement Class Member's warranty rights with respect to any condition, material, workmanship, or defect other than those pleaded in the Fourth Amended Complaint; and such preserved warranty rights also are included within the meaning of Retained Rights. With respect to any action asserting Retained Rights, the Settling Defendants agree that venue shall lie wherever venue is proper. Settling Defendants waive the right to assert or plead, directly or indirectly, in whole or in part, that this Settlement Agreement, the release contained herein, the Final Judgment, any findings of fact or conclusions of law entered by the Court, or the legal effect of any of the foregoing, is res judicata, collateral estoppel, claims preclusion, judicial admissions, waiver, release, accord and satisfaction, payment, or any other bar of or defense to any Settlement Class Member's assertion of any Retained Rights.

The Settlement Class Members and Settling Defendants do, however, expressly retain the right, to the extent permitted by law and this Settlement Agreement, to plead this Settlement Agreement as a full and complete defense to, or as the basis for an injunction against, any action, suit or other proceeding to recover any claim released by this Settlement Agreement, which may be instituted, prosecuted or attempted in breach of this Settlement Agreement. As part of the Final Judgment, NECEL and NEC Corporation will be dismissed without prejudice.

## **2.7 Limits of Consideration**

**The Per Unit Settlement Packages and payment of costs, fees, and expenses, as described above, are the only consideration,**

fees, costs or expenses that Settling Defendants or the Released Parties shall be obligated to give to any Settlement Class Member, or Settlement Class Counsel in connection with the settlement and release of the Released Rights and/or the payment of attorneys' fees and expenses.

### 2.8 **Denial of Liability**

Settling Defendants and the Released Parties do not admit any wrongdoing or liability and deny the Class Representatives' and Settlement Class' allegations. The proposed settlement is a compromise of disputed claims and does not mean that Settling Defendants are liable under the causes of action asserted by the Class Representatives. The terms of the settlement are a matter of public record and are not confidential. Any capitalized terms used in this Class Notice that are not defined herein shall have the meaning specified in the Settlement Agreement.

## **3. RIGHTS AND OPTIONS OF CLASS MEMBERS**

### 3.1 **Class Member Rights and Options**

As a Class Member, you have the following rights and options:

#### 3.1.1 **You may become a Settlement Class Member.**

If you do not request exclusion from the Settlement Class, you will become a Settlement Class Member. Your interests will be represented by the Class Representatives and Settlement Class Counsel. Class Counsel have established a toll free phone number (1-888-353-8139) dedicated to answering your questions. Class Counsel also have established a dedicated mailing address to receive your correspondence: P.O. Box 4047, Beaumont, Texas 77704-4047. Settlement Class Counsel are Wayne Reaud, The Reaud Law Firm, 801 Laurel Street, Beaumont, Texas 77701 telephone: (409) 838-1000 facsimile: (409)833-8236; Hubert Oxford III, Hubert Oxford III, P.C., 3535 Calder Avenue, 3<sup>rd</sup> Floor, Post Office Box 150, Beaumont, Texas 77704-0150 telephone: (409) 833-9182 facsimile: (409) 833-8819; Gilbert I. Low and Gary N. Reger, Orgain, Bell & Tucker, L.L.P., 470 Orleans, 4<sup>th</sup> Floor, Post Office Box 1751, Beaumont, Texas 77704-1751 telephone: (409) 838-6412 facsimile: (409) 838-6959; and L. DeWayne Layfield, Law Offices of L. DeWayne Layfield, P.O. Box 3829, 909 Laurel, Beaumont, Texas 77704-3829 telephone: (409) 832-2109 facsimile: (409) 832-2156. You will not be charged for the services of Settlement Class Counsel. If the settlement is approved by the Court and the Judgment becomes final, you will be entitled to receive one or more of the Per Unit Settlement Packages described above in the Terms of Proposed Settlement. **To receive your Per Unit Settlement Package, you must complete and send in the attached Claim Form postmarked by midnight on the Final Claims Date (which is expected to be June 3, 2000). Additional Claim Forms may be downloaded from the following web sites: [www.FDC-class-settlement.com](http://www.FDC-class-settlement.com) and [www.computers.Toshiba.com](http://www.computers.Toshiba.com). If you fail to properly and timely complete and send in the Claim Form, you will lose your right to recover a Per Unit Settlement Package. As a Settlement Class Member, you will be bound by any judgment or other disposition of this Class Action, even if you do not mail in a Claim Form. If the Court approves the settlement, the Court will enter a Final Judgment dismissing with prejudice all of your Released Rights against all Settling Defendants.** Further, as a Settlement Class Member, you, your heirs, executors, administrators, representatives, agents, partners, successors, and assigns will be deemed to have agreed to the terms of the release and discharge set forth in §2.6 of the Terms of Proposed Settlement, and in §15 of the Settlement Agreement.

#### 3.1.2 **You may request exclusion from the Settlement Class.**

If you request exclusion from the Settlement Class, you will not be bound by any judgment or settlement of this action, and you will not receive the benefits of the settlement. If you wish to be excluded from the Settlement Class, you must send in an Opt-Out Form by certified mail stating: 1) your name, address, and telephone number; 2) the approximate date of purchase or acquisition of a computer; 3) whether you own or lease the computer; 4) the model number and serial number of the Computer, which are located on the bottom of the Computer; and 5) that you wish to opt out and be excluded from the Settlement Class. **Opt-Out Forms (attached) must be sent to: FDC Class Settlement Claims Administration, 1101 Stewart Avenue, Suite 207, Garden City, New York 11530, by certified mail, postmarked no later than midnight on the 5th day of January, 2000.** Opt-Out Forms also are available on the following web sites: [www.FDC-class-settlement.com](http://www.FDC-class-settlement.com); and [www.computers.Toshiba.com](http://www.computers.Toshiba.com). Opt-Out Forms and requests for exclusion will not be accepted if made verbally, by facsimile, e-mail, regular mail or other means. **Failure to follow these instructions for requesting exclusion will result in a waiver of your right to exclude yourself from the Settlement Class.**

#### 3.1.3 **You may enter an appearance in the Action through counsel of your choice.**

Settlement Class Members may enter an appearance in the Action through counsel of their choice.

#### 3.1.4 **You may object to the Settlement.**

Settlement Class Members may object to the settlement by filing a written objection with the Clerk for the United States District Court for the Eastern District of Texas, Beaumont Division, Jack Brooks Federal Building, 300 Willow Street, Beaumont, Texas 77704. **Objections must be postmarked no later than midnight on the 5th day of January, 2000.** A copy of any objection must also be mailed to Settlement Class Counsel, P.O. Box 4047, Beaumont, Texas 77704-4047 and to Frank G Jones, Fulbright & Jaworski L.L.P., 1301 McKinney, Suite 5100, Houston, Texas, 77010, postmarked by midnight on the 5th day of January, 2000. **You cannot both request exclusion and object to the settlement. Only Settlement Class Members may object to the settlement.** The objection must include:

- (1) A statement of each objection asserted;
- (2) A detailed description of the facts underlying each objection;
- (3) A detailed description of the legal authorities supporting each objection;
- (4) A statement of whether the objector intends to appear and argue at the Fairness Hearing and, if so, how long the objector anticipates needing to present the objection;
- (5) A list of witnesses whom the objector may call by live testimony, oral deposition testimony or affidavit during the Fairness Hearing; and
- (6) A list of the exhibits which the objector may offer during the Fairness Hearing, along with copies of such exhibits.

#### **4. THE SETTLEMENT HEARING**

The Court has given its preliminary approval to the proposed settlement, has conditionally certified the Settlement Class, and has approved appointment of Class Representatives and Settlement Class Counsel. **The Court will hold a hearing in the Courtroom of the United States District Court for the Eastern District of Texas, Beaumont Division, Judge Thad Heartfield presiding, Jack Brooks Federal Building, 300 Willow Street, Beaumont, Texas 77704, on the 19th day of January, 2000, at 10:00 o'clock a.m., to determine whether, as recommended by Class Representatives and Settlement Class Counsel, it should confirm final certification of the Settlement Class, give final approval to the proposed settlement, allow or disallow the application for attorney fees, litigation expenses, and Class Representative fees, and make such other rulings incident thereto as are provided in the Settlement Agreement, including but not limited to executing the proposed Final Judgment, which will dismiss with prejudice all of the Settlement Class Members' Released Rights against the Settling Defendants.**

Attendance at the hearing is not necessary; however, any Settlement Class Member wishing to be heard orally in opposition to the proposed settlement must indicate this intention in his or her objection as explained in §3.1.4 above. Settlement Class Members who support the proposed settlement do not need to appear at the hearing or take any other action to indicate their approval.

#### **5. FURTHER PROCEEDINGS**

If the Settlement Agreement is approved by the Court, and if you complete and mail in your Claim Form within the time set forth above, you will receive your cash and/or coupon portion of the Per Unit Settlement Package within five (5) business days after the claim has been allowed by the Claim Administrator. Only one Claim will be allowed per eligible Toshiba Laptop Computer. The Claim Administrator will begin processing claims eleven (11) days after the Final Judgment becomes "Final", as defined in the Settlement Agreement.

If the settlement is not approved or if it is approved but the Final Judgment not become Final, the Settlement Agreement will terminate and be null and void (except as provided in §19.2 of the Settlement Agreement), and the Court will vacate the conditional certification of the class, appointment of the Settlement Class Representatives and Settlement Class Counsel, and the Action will proceed as though the Settlement Class had never been certified and the appointments had not been made.

#### **6. ADDITIONAL INFORMATION: OBTAINING A COPY OF THE SETTLEMENT AGREEMENT AND RELEASE**

Any questions you have about the matters in this Class Notice should be directed in writing to Settlement Class Counsel, P.O. Box 4047, Beaumont, Texas 77704-4087. You may also receive information from Settlement Class Counsel's website: [www.FDC-class-settlement.com](http://www.FDC-class-settlement.com). You may also receive information from FDC Class Settlement Claims Administration, P.O. Box 9344, Garden City, NY 11530-9344 or by calling 1-888-353-8138. **Questions may not be directed to the Court.** The content of this Class Notice is only a summary of the terms of the Settlement Agreement. If you wish to obtain a copy of the Settlement Agreement and Release, you may do so by requesting it in writing from Settlement Class Counsel at the above address or website.

You may, of course, seek the advice and guidance of your own attorney if you desire. The pleadings and other records in this litigation may be examined and copied at any time during regular office hours at the office of the Clerk for the United States District Court for the Eastern District of Texas, Beaumont Division, Jack Brooks Federal Building, 300 Willow Street, Beaumont, Texas 77704.

#### **7. SUMMARY OF TIME LIMITS**

7.1 If you wish to be excluded from the Settlement Class, you must send your Opt-Out Form (attached) by certified mail to: FDC Class Settlement Claims Administration, 1101 Stewart Avenue, Suite 207, Garden City, New York 11530, postmarked on or before the 5th day of January, 2000.

7.2 To receive one of the Per Unit Settlement Packages, your Claim Form (attached) must be postmarked on or before the Final Claims Bar Date, which is expected to be June 3, 2000. You must send your Claim Form to: FDC Class Settlement Claims Administration, P.O. Box 9344, Garden City, NY 11530-9344.

7.3 If you wish to object to the proposed settlement, you must file your written objection with the District Clerk by mail postmarked before the 5th day of January, 2000. You must also send a copy to Settlement Class Counsel, Post Office Box 4047, Beaumont, Texas, 77704-4047 ; and to Frank G. Jones, Fulbright & Jaworski, L.L.P., 1301 McKinney, Suite 5100, Houston, Texas 77010. You must include any request to be heard orally at the hearing. **(See §3.1.4 for the information that must be included in any objection.)**

7.4 **The Court will conduct a hearing to determine whether to approve the proposed settlement, final judgment, attorneys' fees, and representatives' fees, and whether to certify the Settlement Class on January 19, 2000, at 10:00 a.m., in the United States District Court for the Eastern District of Texas, Beaumont Division, Jack Brooks Federal Building, 300 Willow Street, Beaumont, Texas.**

Dated: November 10, 1999

\_\_\_\_\_/s/  
Mr. David J. Maland, Clerk  
United States District Court  
for the Eastern District of Texas  
Jack Brooks Federal Building  
300 Willow Street  
Beaumont, Texas 77704

**EXHIBIT A**  
**Cash Remedy Due Per Unit**

<b>MONTH OF PURCHASE</b>	<b>CASH REMEDY PER UNIT</b>
March 1998	\$210.00
April 1998	\$221.10
May 1998	\$232.20
June 1998	\$243.30
July 1998	\$254.40
August 1998	\$265.50
September 1998	\$276.60
October 1998	\$287.70
November 1998	\$298.80
December 1998	\$309.90
January 1999	\$321.00
February 1999	\$332.10
March 1999	\$343.20
April 1999	\$354.30
May 1999	\$365.40
June 1999	\$376.50
July 1999	\$387.60
August 1999	\$398.70
September 1999	\$409.80
October 1999	\$420.90
November 1999	\$432.01
December 1999	\$443.21